

November 10, 2015

On Friday, October 30, 2015, the Federal Trade Commission conducted a workshop in Washington, DC on lead generation practices, with a specific consumer protection focus on activities in the higher education sector including ed tech companies. The agency's day-long event emphasized that the FTC is keeping an increasingly close eye on the lead generation industry, which has already drawn scrutiny under the FTC's investigational authority, and this review may ultimately impact the marketing practices of traditional and next-generation educational institutions, including both for-profit and non-profit colleges and universities.

## Background: additional marketing regulations target the education sector

In 2010, the Department of Education ("Department") published final regulations on a variety of program integrity issues, including significant revisions to the Department's misrepresentation rules. *See* 34 CFR § 668.71. These revisions significantly increased the risk to schools of making any misrepresentations in its marketing materials by expanding the rule to cover essentially any statements made by an institution, or its employees or *agents* (such as lead gen firms and ed tech vendors), to any third party. Moreover, the rule was expanded to include any statements that were merely *likely* to mislead or deceive. Instances of misrepresentation can result in significant fines and can even result in loss of Title IV eligibility. To date, the Department has not used this new authority extensively.

Shortly thereafter, in 2013, the Federal Trade Commission ("FTC") released updated official guidance on deceptive marketing practices in the education sector (commonly referred to as the "*Guides*"). *See* 16 C.F.R. § 254. Building on the FTC's general ban on unfair or deceptive practices, the Guides identified particular conduct that constitutes a deceptive practice, including any representation without qualification that a *school* is accredited, unless *all* courses and programs are accredited and any misrepresentation through pictures about facilities, training methods, or equipment. Although the Guides are ostensibly directed at vocational and distance education schools, the FTC also made it clear upon publication that it had authority to pursue enforcement actions against any for-profit corporation "in [the education] area," including lead generation companies and other service providers. 78 Fed. Reg. 68989, n.10.

As we noted at the time the Guides were released, the FTC's action signaled a more coordinated effort by the Department and the FTC to align each agency's legal standards and significantly increased exposure for institutions. The agencies share enforcement responsibilities and, more importantly, information, which has helped open the door for the states' attorneys general and plaintiffs' lawyers to bring suits under state laws that closely track the FTC Act. In recent years, schools and lead generation companies have faced a range of private and government-led suits and enforcement actions at the state level, often with several states' attorneys general working in coordination. In addition, the FTC itself recently initiated high-profile investigations into the marketing practices of several for-profit education providers.

## Lead generation practices: new benefits and opportunities for abuse

Lead generation, or performance marketing, broadly covers internet-based marketing designed to generate consumer interest in products or services by soliciting information from an individual who has expressed interest in a particular product or a related product. The business comprises various models, including use of pay-per click search engines and use of banner ads that direct user information to call centers. It has also spawned its own mini-industry of support companies offering such services as call servicers and lead management and compliance tools. One panelist estimated that lead generation constitutes a \$1.3 billion dollar industry.

Education is a major market for lead generation companies because a college degree or other credential is an expensive purchase that consumers tend to weigh carefully. Encouraging individuals to voluntarily provide information to learn more about schools carries clear benefits in terms of better matching of students and

schools. However, the availability of generous federal education subsidies and the inherent appeal of education to vulnerable sectors of the population can sometimes promote unfair and deceptive marketing practices.

## Key takeaways from the FTC workshop

We believe there are two important takeaways from the FTC's lead generation workshop:

### FTC intends to closely monitor lead generation

Both the FTC and the Department made it clear during the workshop that they consider the lead generation industry, and particularly lead generation in education, to provide important public benefits. However, they also see it as an industry that is prone to abuse. The FTC indicated that the workshop was part of a process to evaluate, and build a public record for, new FTC guidelines that may target particular practices. A common sentiment shared by panelists at the workshop is that current laws regarding misrepresentations and unfair practices are not being applied effectively, and in some cases may actually encourage misconduct. Several panelists suggested that an industry-wide code of conduct would be helpful or that FTC guidelines on permissible marketing could eliminate some of the conduct in the industry that has generated criticism and pushed the boundaries of compliance.

### Non-profits also need to assess their risks

Another point that came out of the panel discussion is that the client mix for lead generation companies (those paying for lead generation services and information) has shifted significantly from for-profit institutions to non-profit institutions as the latter have expanded into online education. We believe this is unfamiliar territory for many non-profit institutions, and one that carries significant risks. In addition to reputational risk of hiring lead generation servicers that engage in practices determined to be deceptive, the FTC has the authority to enforce its rules against lead generation companies, which can then attach to non-profit institutions as violations of the Department's misrepresentation rule (on an agency theory), or possibly as violations of the Department's incentive compensation rule (a rule that prohibits schools or their third-party contractors from paying compensation on the basis of securing enrollments). In addition, while the FTC has no statutory authority over non-profits, some state consumer protection laws reach non-profit institutions and such laws may expose schools that are using deceptive lead generation practices (perhaps unknowingly) to legal liability.

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## Key Contacts

Scott Dailard San Diego	sdailard@cooley.com +1 858 550 6062
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